No. 3679

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS CABIALE and ANDREW DONIZELLO,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

CHAUNCEY F. TRAMUTOLO,
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Abstract of the Case.

The plaintiffs in error, together with Pietro Gabalo, G. Bertollotti, Peter Zurich, Attilio Parcelini, Frank Colai and Dante Forasiepi, were informed against in the Southern Division of the District Court for the Northern District of California for violating the so-called National Prohibition Act. The information, which will be found at pages 2-21 of the Transcript of Record, is in eleven counts, which charge or attempt to charge in substance as follows:

FIRST COUNT.

That on the 22nd day of July, 1920, the defendants therein named maintained a common nuisance at a

place known as the Gianduja Hotel, in that they did keep on the premises certain claret wine of an alcoholic content prohibited by the statute.

SECOND COUNT.

That the defendants on the same date did wilfully, unlawfully and knowingly *have in their possession* certain intoxicating liquor, to wit, claret wine.

THIRD COUNT.

That the defendants on the same day did *sell* certain intoxicating liquor, to wit, claret wine.

FOURTH, FIFTH AND SIXTH COUNTS.

These counts are identical in phraseology with the third, each of them charging that the defendants on the 22nd day of July, 1920, and at the same place, did sell claret wine of prohibited alcoholic content.

SEVENTH COUNT.

That on the 23rd day of July the defendants, at the same place, did unlawfully, wilfully and knowingly maintain a common nuisance, in that they did then and there keep claret wine, jackass brandy, vermouth, and mareschino of prohibited alcoholic content.

EIGHTH COUNT.

That the defendants, on the 23rd day of July, did unlawfully, wilfully and knowingly *have in their possession,* on the same premises, claret wine, jackass brandy and mareschino.

NINTH COUNT.

That the defendants, on the 23rd day of July, at the same place, did unlawfully, wilfully and knowingly *furnish* to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, claret wine containing a prohibited alcoholic content.

TENTH COUNT.

That the defendants, on July 23rd, at the same place, did unlawfully, wilfully and knowingly furnish to George Poultney and C. W. Herbert certain intoxicating liquor, to wit, cocktails.

ELEVENTH COUNT.

That on the last mentioned day, and at the same place, the defendants did unlawfully, wilfully and knowingly, sell certain intoxicating liquor, to wit, whiskey.

The jury by its verdict (Transcript, page 27) found the plaintiff in error Cabiale guilty on counts two, three and eight, and the plaintiff in error Donizello guilty on counts two, three, eight, nine and ten. The other defendants were found not guilty on all counts. The eleventh count was withdrawn by the court from the consideration of the jury, by reason of the fact that there was no evidence introduced as to any sale of whiskey (Transcript, page 93). Thereafter the plaintiffs in error moved for a new trial upon the ground that the verdict was against the law, and the evidence, and also upon the ground of newly discovered evidence. A motion

in arrest of judgment was also interposed (Transcript, page 105) upon the ground that the information failed to state an offense against the laws of the United States. These motions were denied by the court, which thereupon passed judgment that both of the plaintiffs in error be imprisoned for the period of six months in the county jail (Transcript, page 116).

A writ of error having been duly allowed, the cause is before this court for review.

Specifications of Errors.

In accordance with the provisions of Rule 24 of this court, we now specify the errors relied upon, and shall set out the same separately and particularly.

It is our contention that the judgment of the court below should be reversed for the following errors, to wit:

(1) That the court below erred in passing judgment of imprisonment upon the plaintiffs in error for the reason that count three of the information does not state facts sufficient to charge any crime against the United States, and the remaining counts of the information upon which each of the plaintiffs in error was convicted do not even attempt to allege any violation of the Volstead Act for which a penalty of imprisonment is provided.

(2) That the verdict of the jury and the judgment of the court was against law in this, that all of the counts upon which each of the plaintiffs in error was convicted was based upon the same alleged violation of the law, and that the verdict and judgment, therefore, violated the rule which prohibits the splitting of one transaction into several offenses.

(3) That as to both of the plaintiffs in error, the evidence was insufficient to justify the verdict.

(4) That the trial court erred in admitting in evidence, over the objection of the plaintiffs in error, certain tags taken from the cash register of the Gianduja Restaurant (Transcript of Record, page 41) and also erred (Transcript, pages 86 and 87) in denying the offer of the defense to introduce certain other tags in evidence.

(5) That the trial judge committed a plain error within the meaning of Rule 11 of this court in giving the following charge to the jury:

> "We have here a number of defendants charged with a violation of the National Prohibition Law. Now, I need not say to you that whatever the sentiment is for or against the enforcement of this Prohibition Law, that is a matter with which you and I are not concerned. Your duty, equally with mine, under your oaths, and my oath, is to administer the law as we find it, whether we agree with the principle or purpose of it, or not. We have in this court, awaiting trial, some 200 or 300 defendants charged under this law. Whether these men are

guilty or innocent will be determined by each jury as the facts are presented to them. The acquittal of a man who is guilty of any charge simply encourages other men to go out and commit a similar offense. No law can be enforced without the assistance of the jury, who have the final say in all criminal cases. Now, if juries are going to acquit men who are guilty, the result will be that we will never get through. Unfortunately, this is the only court in this district, extending from the county of Monterey to the Oregon line, and from the Pacific Ocean to Nevada, upon which the enforcement of this law falls, and without the assistance of the jury we cannot enforce it at all. I say this not to influence you in passing upon this case, or any subsequent one, but to impress upon your minds that in dealing with these matters you are dealing with a very important subject. We are dealing with a law that has been adopted by a majority, we must abide by it and attempt to enforce it until such time, if that time ever comes, that the law may be changed. It is also true that men who violate this law do it because they make money out of it. There is no question of any principle involved in so far as they are concerned. When they violate the law, they violate it because they can make money by so doing. Now, I think this court has been quite vigilant in protecting the rights of citizens and individuals from the sometimes over-zealous acts of officers in the enforcement of this law, but the court will be equally vigilant in upholding the officers in acts where they are acting within the law. There can be no question of the legality of the actions of the officers in the present case."

We shall now proceed to a discussion of these counts in the order indicated.

Brief of the Argument.

I.

THE THIRD COUNT OF THE INFORMATION DOES NOT CHARGE ANY CRIME OR OFFENSE AGAINST THE UNITED STATES.

It was only upon the verdict finding the plaintiffs in error guilty on the third count that the trial judge had any jurisdiction to impose a sentence of imprisonment upon either of the plaintiffs in error. This count attempts to charge them with having made a sale of liquor on the 22nd day of July, 1920. On the other counts of the information which charge sales and on the first count, which charged the maintaining of a nuisance, the plaintiffs in error were found not guilty; while the counts other than the third, on which they were convicted, merely charged possession or furnishing of liquor, for which a jail sentence could not, under the provisions of the Volstead Act, be imposed (Section 29, Title II of the National Prohibition Act). The trial judge did not impose separate sentences on each of the counts on which the defendants were convicted, but passed a sentence of imprisonment upon each of them, without any reference whatever as to the separate counts. It was only on the verdict as to count three that any sentence of imprisonment could be passed. If, therefore, that count is fatally defective, the judgment must be reversed.

The charging part of the third count reads as follows:

> "Did then and there wilfully, unlawfully and knowingly, and in violation of Section 3, Title

> II of the Act of October 28, 1919, known as the National Prohibition Act, sell certain intoxicating liquors, to wit, claret wine, containing one-half of one percent or more of alcohol by volume, and then and there fit for use for beverage purposes. That the sale of the said intoxicating liquor by the said defendants, at the time and place aforesaid, was then and there prohibited and unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act."

It will be noted that this count of the information merely charges that the defendants did *sell* the liquor therein referred to, and that the same was fit for use for beverage purposes. It is not charged that the liquor was, in fact, sold for beverage purposes. Under the fundamental rules of law applicable to indictments and informations, it must, therefore, be presumed that the liquor was not, in fact, sold for beverage purposes. The information must be construed as against the pleader; no intendment or inference can be indulged in favor of a defective indictment or information.

The statute upon which this information is based does not make all sales of liquor that is fit for use for beverage purposes unlawful. If it attempted to do so, it would be void, because the statute would then transcend the power given to Congress by the Eighteenth Amendment to the Constitution. It will be conceded at the outset, we believe, that in the absence of a constitutional amendment Congress would have had no power to pass such an act as the so-called Volstead Act. Prior to the adoption of that

amendment the right to prohibit the sale of alcoholic liquors rested solely within the police powers of the several states. The Constitution of the United States is a grant of power, and the various departments of the Federal Government possess only those powers which are expressly or impliedly conferred upon them by the Constitution.

So. Carolina v. United States, 199 U. S. 437;
Martin v. Hunter, 1 Wheaton, 304;
Sponner v. McConnell, 22 Fed. Cases No. 13,245;
United States v. McCullaugh, 221 Fed. 288.

An Act of Congress for the enforcement of a constitutional provision is void if it is broader in its terms than the constitutional provision which it was enacted to enforce.

Karem v. United States, 121 Fed. 250.

Now the 18th Amendment to the Constitution merely prohibits the manufacture, sale, and transportation of liquor for *beverage purposes.* It would, therefore, be beyond the power of Congress to prohibit sales of liquor for other than beverage purposes, and the third count of this information, which merely charges a sale of liquor without alleging that the sale was made for beverage purposes, charges a crime which Congress had no constitutional power to create.

Furthermore, the third count of this information is insufficient, even under the Volstead Act itself. The information does not even follow the language

of the statute. Section 6 of Title II of the Act provides that,

> "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner so to do."

For all that appears from the third count of the information to the contrary, the defendants may have had a permit from the Commissioner of Internal Revenue authorizing them to sell liquor. An information founded upon a statute must cover every element included in the statutory definition of the crime; and exceptions contained therein must be negatived, in order that the description of the crime may in all respects coincide with the statute.

People v. Miles, 9 Cal. App. 312.

In that case it is said by Presiding Judge Cooper,

> "The law does not presume any material fact not stated in the information as all presumptions are in favor of innocence. If the matters and things set forth in the information may be true under certain circumstances, and the defendant under such circumstances and conditions not guilty of any crime, then the information is not sufficient."

It was said by the Supreme Court of the United States in United States v. Cook, 17 Wallace 169:

> "Offenses created by statute at common law must be accurately and clearly described in an indictment, and if they cannot be in any case without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indict-

> ment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient that does not accurately and clearly allege all the ingredients of which the offense is composed. With rare exceptions offenses consist of more than one ingredient, and in some cases of many; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error."

In view of the failure of the information to follow the statutory description of the crime attempted to be charged, and for the reason tht any statute which attempted to make it a criminal offense to sell liquor for other than beverage purposes would be beyond the power of Congress to enact, we submit that the third count of the information charges no crime. Since this count is the only count on which either of the defendants was convicted on which a sentence of imprisonment could be imposed, it was error of the court to impose the same, and the judgment should be reversed.

II.

THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT WAS AGAINST LAW.

An examination of the several counts in the information reveals the fact that the liquor which in count three the defendants are charged with selling, is the same as that which in other counts of the in-

formation they are charged with possessing and furnishing. Obviously, liquor that is sold must also be possessed. Furthermore, the evidence clearly shows that the various offenses attempted to be charged in the various counts of the information are one and the same transaction. It is a sound rule of law, founded upon the plainest principles of natural justice that where a criminal act has been committed, every part of which may be alleged in a single count of an indictment and proved under it, the act cannot be split into several distinct crimes.

III.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE VERDICT.

It is our contention that the evidence in this case is insufficient to justify the verdict, at least, in so far as it relates to the third count, for two reasons.

First. The evidence fails to show a sale of liquor by either of the defendants. It will be borne in mind, as we have previously pointed out, that the third count is the only count in the information charging a sale on which the defendants were convicted. This count alleges a sale made by the defendants on the 22nd of July of claret wine. Now, the only testimony as to any sale of claret wine is the testimony of the witness Poultney (Transcript, page 30). Poultney's testimony in that behalf is as follows:

> "I was in the place of Mr. Cabiale with these gentlemen on July 22nd, the evening before. I

saw Mr. Cabiale there, I believe, on that evening, and I observed, as I was leaving, the gentleman with the bald head next to Mr. Cabiale. On that evening we bought four glasses of claret. On the first night the time we went there they charged 25c a drink for the claret; the next night, for some reason, we did not pay anything at all. The reason was everybody said the place was raided and we had better get out of there, so I, with my party, we got out, with the rest of the patrons of the place. On the evening of the 22nd we had two rounds, we drank the claret; one of the glasses we poured into a bottle—one of the glasses of claret. The first night I had spoken to Mr. Cabiale and told him that I had come down for a little something to eat, and I wanted to get something to drink, and he said that was all right, I could have what I wanted. I do not see anybody here of these defendants that served the liquor on that night. Mr. Cabiale ushered me to a seat and took my order, and subsequently I was served by a waiter. I gave my order for eats and drinks to Mr. Cabiale."

This is the entire testimony with respect to the sale made to George Poultney and party, as charged in Count Three of the information. There were no other witnesses to corroborate Mr. Poultney's testimony. There is no testimony in the entire transcript that the defendant Donizello was in the restaurant on July 22nd, as charged in Count Three of the information. The witness Poultney does not testify that he ordered claret or any other intoxicating liquor from Cabiale, and he states specifically that the person who served him with the liquor was not one of the defendants on trial. The only evi-

dence as to the alcoholic content of this alleged claret is as follows: Poultney testifies (pages 30-31) that on the evening of the 22nd, he poured the contents of one of the glasses into a bottle. On cross-examination, the witness admitted that he could not tell the quantity of alcohol which a drink contained, "except on a very strong drink" (page 31). R. F. Love, the government chemist, who testified as to the alcoholic content of the exhibits, admitted that grape juice, exposed to the air, will acquire the same alcoholic content as wine when originally made. In view of the failure of the witness to testify that he had ordered any alcoholic liquor, and the admission of the government's chemist that the alcoholic content of the exhibit might have been due to exposure to the air, we submit that the evidence is insufficient as a matter of law to justify the verdict.

Second. Even if the evidence hereinabove quoted should be held sufficient to have justified the jury in drawing an inference that the defendant Cabiale authorized the sale of claret to Poultney and his party, nevertheless, the conviction on the third count of the information must be reversed for another reason. Poultney was a government officer, testifying, "I am a Federal Prohibition Agent, and have been such since the time prohibition took effect, some time in January, 1920." He then proceeds to give the testimony previously quoted to the effect that he went into the Gianduja Restaurant on the night in question and solicited the defendant Cabiale to make the

sale of liquor alleged in Count Three of the information.

This brings the case clearly within the rule of the agent provocateur. That rule has been well stated by Presiding Justice Gilbert of this court in Woo Wai v. United States, 223 Fed. 415. That case, as this court will remember, was an indictment for an alleged conspiracy on the part of the defendants to smuggle certain Chinese across the border from Mexico into the United States. The evidence showed that the commission of the alleged offense was suggested by Federal officers. After reviewing the evidence, Judge Gilbert says:

> "We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, and that a sound public policy can only be upheld by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes."

The earlier authorities, state and Federal, to the same effect, are collected and quoted from elaborately in the footnote to the decision in the Woo Wai case, in 137 C. C. A. 609.

In the later case of Sam Yick v. United States, 240 Fed. 60, the Woo Wai case and the earlier cases to the same effect are cited with approval, and this court reiterates its stand that it will not sanction a conviction for a crime incited by the solicitation of Government officers.

In United States v. Echols, 253 Fed. 862, the court, after stating the agent provocateur rule, goes on to say:

> "This rule does not proceed from or rest on any limitation of the right of the officers of the law to obtain evidence of crime in any manner possible, nor is it a defense to a prosecution that the officer participated in the commission of a crime, if the genesis of the idea, or the real origin of the criminal act, sprang from the defendant and not from the officer; or as the differentiation is well stated in 12 Cyc. 160: 'The fact that a detective or other person suspected that the defendant was about to commit a crime, and prepared for his detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design.' But this statement in no manner authorizes Government officers, employed to prevent crime and apprehend criminals, to thus conceive and set on foot the commission of an offense merely in order to make an arrest."

In the case at bar the evidence of Poultney herein above quoted clearly shows that the offense of selling liquor, if any were committed, was committed at the instigation and suggestion of Poultney himself. There is no conflict about that phase of the evidence. The test has been laid down in the foregoing cases is this: was the criminal offense suggested by the officer or did it originate in the mind of the accused? In the former case the undoubted law prevalent in the federal courts is that a conviction of the accused for a crime suggested by the officer will not be upheld. Now it appears in this

case without contradiction that the sale charged in the third count of the indictment had its genesis in the mind of Poultney and not in the mind of Cabiale. The latter made no suggestion as to any sale of liquor; it was the government officer who went to the restaurant keeper and told him that he wanted to get something to drink. Had it not been for Poultney's request and suggestion the sale would not have been made.

As to the defendant Donizelo, there is not a word of evidence to uphold his conviction on Count Three in view of Poultney's testimony that he did not see him on the night of July 22nd. It is true that the evidence shows that Donizelo was one of the owners of the Gianduja Restaurant, but that alone is not sufficient to charge him with liability for the act of his partner or of one of his employes which he did not authorize. Proof of express authorization is necessary to charge one with criminal responsibility for the acts of another.

The cases are uniform to this effect. We will call the attention of the court to a few of them. In People v. Green, 22 Cal. App. 45, 50, it is said:

> "The civil doctrine that a principal is bound by the acts of his agent within the scope of the latter's authority has no application to criminal law (1 McLain on Criminal Law, sec. 188). While false pretenses may be made to (by?) an agent of (to?) the person defrauded, yet when made by an agent they must be directly authorized or consented to in order to hold the principal, for authority to do a criminal act will not be presumed (1 McLain on Criminal Law, sec. 683)."

Commonwealth v. Stevens, 155 Mass. 291, 29 N. E. 508, was a prosecution for illegally selling liquor to a minor. The evidence showed that the sale was made by the clerk of the defendant. The court says:

> "The criminal liability of a master for the act of his servant does not extend so far as his civil liability, inasmuch as he cannot be held criminally for what the servant does contrary to his orders, and without authority, express or implied, merely because it is in the course of his business, and within the scope of the servant's employment; but he would be civilly liable for a tort of this kind (George v. Gobey, 128 Mass. 289; Roberge v. Burnham, 124 Mass. 277)."

In Grant Bros. Const. Co. v. United States, 13 Ariz. 388, 114 Pac. 955, it is said:

> "This act, a statute of the United States, being penal in its consequences, must be strictly construed, and as knowledge is the principal and indispensable ingredient of the offense, the government, the plaintiff in the case, must be held to proof of such knowledge or to proof of circumstances from which it might be fairly inferred. Unless the evidence, therefore, affords proof of knowledge by the construction company, or proof of circumstances from which such knowledge may be fairly inferred, of the acts of Carney and his associates, the construction company cannot be held liable for such acts of Carney, for the master or principal is not liable criminally for the unlawful acts of his agents or servants, though such unlawful act be committed in the master's business, unless such unlawful act was directed by him or knowingly assented to or acquiesced in."

In State v. Heneghan, 73 West Virginia 706, 81 S. E. 539, we read:

> "The relation of principal and agent, or of employer and employe, is not recognized in the criminal law. By that law, every man must stand for himself."

In cases involving the alleged illegal sale of liquor, the decisions are uniform to the effect that the master is not criminally liable for illegal sales made by his clerk, servant or agent, without his knowledge or consent, express or implied, or in his absence and in disobedience to his commands or instructions. For example, under the Iowa statute relating to liquor nuisances, it was held that one is not liable criminally for an unlawful sale made without his knowledge and consent by his clerk.

State v. Hayes, 67 Iowa 27; 24 N. W. 575.

See also to the same effect:

Grosch v. Centralia, 6 Ill. App. 107;
Lathrope v. State, 51 Ind. 192;
Wadsworth v. State (Texas), 34 S. W. 934.

Thus it has been held that a conviction of selling intoxicating liquor without a license cannot rest upon the evidence merely that the person who made the sale was the defendant's clerk, in the absence of any evidence that defendant authorized the sale or participated therein.

Daniel v. State, 149 Ala. 44; 43 S. 22;
Seibert v. State, 40 Ala. 60.

To warrant a conviction for sales made by defendant's bartender in violation of the law, it must appear that defendant gave no orders not to make such sales, or that if such orders were given they were not in good faith.

Commonwealth v. Tittlow, 28 Pa. Co. Ct. 341.

In the Rhole Island case of State v. Burke, 15 R. I. 324, 4 Atl. 761, it was held that one cannot be convicted of maintaining a liquor nuisance by proof of sales on Sunday by an agent without proof of knowledge on the part of defendant, and without proof of authority, either express or implied.

For these reasons we submit that the evidence was insufficient to justify the verdict on the 3rd count as to either of the plaintiffs in error, and that the judgment of the imprisonment imposed upon such conviction should be reversed.

IV.

THE TRIAL COURT COMMITTED ERROR IN ITS RULINGS AS TO THE TAGS FOUND IN THE CASH REGISTER.

During the testimony of H. M. Kupser (Transcript, page 42), one of the prohibition agents who testified on behalf of the government, the following evidence was given:

> "I noticed as the various waiters would come up with their tags, they would have some sort of a tag and would produce it at the cashier's, where he registered it, and the amount was rung up according to what appears on the tag.

The tags were then put in the cash register. I got some of these tags which were in the bundle in the cash register. I did not put any mark on them, I put no identification marks on them. I believe they were turned over to Mr. Shaen; that is, after we arrived back at the Agent's office they were put in his desk.

Thereupon the United States Attorney offered the said tags in evidence; the two offered read as follows:

'Gianduja, Waiter No. 10, Check No. 24. Number of persons. 2 Cafe Royal $1. 1 whisky, 74 cents. 2 Wine, 50 cents, $2.25. War Tax, 10 cents. $2.35.

Gianduja Restaurant, Waiter No. 10, check No. 36. Short 25 cents. 2 Cafe Royal $1. 2 whiskey $1.25. 1 wine 25. Total, $250.'

To the introduction of this evidence counsel for the defendant then and there objected upon the grounds that there was no means of identifying the said tags and that the same were not taken pursuant to a search-warrant.

The Court (Transcript, p. 41). You cannot raise that question here in the middle of the trial. There is a time and place to try that issue. You cannot try it here now.

Mr. Tramutolo. Here is our situation——

The Court (interrupting). I do not care to hear about it from you now. I am quite familiar with the law, and have been quite lenient with defendants in enforcing it.

Mr. Tramutolo. We are trying a collateral matter here as to checks that were found there.

The Court. We are not trying any collateral matter. These men are charged with the sale of liquor. They say they did not sell the liquor there. In their cash register is found a check which on its face purports to be a check for the sale of whiskey and the sale of wine. The defendants can make such explanation about that as they desire later on.

To this ruling of the court counsel for the defendants then and there duly excepted."

This ruling of the court was manifest error. If it had been shown that the two tags which were introduced in evidence were issued on the night in question, it would, of course, have been proper to admit them. But under the circumstances no proper foundation had been laid for their introduction. It was not shown when the tags were issued or when the sales were made. The testimony of the witness shows that they were part of a bundle of tags found in the cash register, which might for all that appears to the contrary have been there for five years. According to the testimony given by the defendants the tags in question were old tags which had been retained because of some mistake made by the waiters, and which had been kept in the register since a time ante-dating the enactment of the National Prohibition Act. No foundation having been properly laid for their introduction the admission of these tags was error highly prejudicial to the defendants in that it created an inference that they were making a busines of illegally selling whiskey. It should require little argument to point out the obvious absurdity of the theory that a restaurant keeper violating the National Prohibition Act would keep documentary evidence of his crimes in his own cash register. In any event it was manifestly error to the defendants to deny their effort (page 86 of Transcript) to introduce all of the tags of July 22 and 23, the days on which the defendants were

charged with violating the law. The Government certainly had no right to take two tags of a designated day, which might have been before the enactment of the Prohibition Act, and seek to charge the defendants with a violation of the law. It was likewise doubly unfair to deny the defendants the right to introduce in evidence all of the tags in the cash register which were issued on the two days mentioned in the information, in order to show that there was no record of any sales of liquor.

V.

THE LANGUAGE OF THE TRIAL JUDGE WAS PLAIN ERROR.

We have set forth in the second sub-division of this brief the language used by the trial judge in the introductory portion of his charge to the jury. This language was highly objectionable and was palpably prejudicial to the defendants. The trial judge told the jury in substance that the calendar of the court was overcrowded, that there were some three hundred defendants waiting trial for alleged violations of the Prohibition Act and that unless they convicted guilty men, the result would be "that we will never get through". He furthermore told the jury that men who violated the Prohibition Act did so "because they make money out of it" (Transcript, pages 90-91).

This language of the trial judge amounted to a statement that the defendants were guilty and that

> action. Where the line must be drawn between comment upon the evidence of fact which is and that which is not permissible is determined only by an examination of the language and a consideration of the circumstances of each particular case."

In the case of Starr v. U. S. 153 U. S. 614, the late Chief Justice Fuller, in commenting upon an objectionable charge by the trial judge as to the necessity of enforcing the law, says:

> "Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules of which and the manner in which the administration of justice should be conducted are the same everywhere, *and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them*" (italics ours).

In this case, the trial judge by telling the jury that the court would never get through with its work and that the acquittal of a guilty man encouraged others to commit the same offense informed the jury in substance that they should find the defendants guilty. Such a charge violates the fundamental and constitutional right of the defendant to the honest and conscientious verdict of the jury influenced by improper suggestions or insinuations or coercive words by the trial judge. It has also been held that a judgment of conviction will be reversed for conduct by the trial judge calculated to produce in the minds of the jury the impression that the judge has a fixed opinion that the defendant is guilty and should be convicted.

Adler v. U. S., 104 C. C. A. 608.

Another recent case also holds that where the evidence in a criminal prosecution is sharply contradictory, it is peculiarly essential that in charging the jury there should be freedom from error.

Erhardt v. U. S., 268 Fed. 326.

It is respectfully submitted that for the errors herein complained of the judgment should be reversed.

Dated, San Francisco,
October 3, 1921.

CHAUNCEY F. TRAMUTOLO,
Attorney for Plaintiffs in Error.